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No. 20-16758

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, et al., Defendants/Appellants,

v.

NATIONAL ASSOCIATION OF WHEAT GROWERS, et al., Plaintiffs/Appellees.

On Appeal from the United States District Court for the Eastern District of California

Nos. 2:17-cv-02401-WBS-EFB (Hon. William B. Shubb)

OPENING BRIEF OF APPELLANT XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

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Johnson v. Monsanto Company 52 Cal. App. 5th 434 (Cal. Ct. App. 2020)
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